

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. CROIX

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| H&O FOOD WAREHOUSE, INC. |) | |
| a/k/a H&O WAREHOUSE INC OF |) | |
| ST. CROIX , |) | |
| Petitioner, |) | D.C. Civ. App. No. 2006/047 |
| |) | Re: Sup. Ct. Civ. 255/1998 |
| v. |) | |
| |) | |
| GOVERNMENT OF THE VIRGIN ISLANDS |) | |
| PUBLIC FINANCE AUTHORITY, |) | |
| and CHARLES W. TURNBULL, |) | |
| Governor of the Virgin Islands, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| HONORABLE LEON KENDALL, Judge, |) | |
| Superior Court of the Virgin |) | |
| Islands, |) | |
| |) | |
| Nominal Respondent. |) | |
| _____ |) | |

On Appeal from the Superior Court of the Virgin Islands

Considered: June 9, 2006

Filed: September 7, 2006

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **CURTIS V. GOMEZ**, Judge of the District Court of the Virgin Islands; and **RHYS S. HODGE**, Judge of the Superior Court of the Virgin Islands, Sitting by Designation.

ATTORNEYS:

JOMO MEADE, ESQ.
St. Croix, U.S.V.I.
Attorney for Petitioner.

MELVIN H. EVANS, AAG
MARIE E. THOMAS, Esq.
VERNE A. HODGE, JR., Esq.
Attorneys for Respondents.¹

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| MEMORANDUM OPINION |
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PER CURIAM.

H&O Food Warehouse, Inc. ("H&O" or "petitioner") files this petition seeking mandamus relief to compel the trial court to rule on a motion for summary judgment that has been pending for two years and a petition for writ of mandamus that has been pending for almost four years.² H&O additionally seeks an award of attorney's fees and costs associated with the filing of this appeal.

For the reasons stated herein, this panel will enter an order affording the trial judge sixty days in which to resolve the pending matters and will retain jurisdiction over this petition. The petitioner's additional request for an award of interest, attorney's fees and costs will be denied.

I. STATEMENT OF FACTS AND PROCEDURAL POSTURE

¹ These attorneys have not filed appearances in this appeal but appear as counsel of record in the underlying matter.

² At the time of this action, the subject motion and petition, which were previously assigned to Judge Ive Swan, were pending before Judge Leon Kendall.

H&O contends it entered into an agreement with the Virgin Islands Public Finance Authority ("PFA") to sell various food and goods to the Government of the Virgin Islands. Pursuant to that agreement, H&O contends it delivered such food and goods valued at \$3,932,706.15 to the Government. H&O contends it was never paid, despite several demands for payment. As a result, on February 20, 1998, H&O filed an action for breach of contract in the Superior Court of the Virgin Islands, naming as defendant the Government of the Virgin Islands. It appears, based on the facts stated in a court of appeals' decision on a related matter, that the PFA disputed the existence of the contract. See *H&O Food Warehouse, Inc. v. V.I. Public Finance Auth.*, 70 Fed.Appx. 611,612-13, 2003 WL 21649500(3d Cir. 2003).

On January 16, 1998 the Virgin Islands Legislature enacted, and then-Gov. Roy L. Schneider approved, Act No. 6197 authorizing the PFA to borrow funds totaling \$106 million on behalf of the Government. One of the stated purposes of that measure was to enable the government to satisfy overdue debts to vendors. On March 18, 1998, the Legislature amended that law in an appropriations measure, Act No. 6222, to requirement payment of the sum of \$3,932,706.15 to H&O. Act 6197 assigned the duty

to obtain and pay those sums to the Public Finance Authority and the Governor.

While the civil action was pending in Superior Court, and after the enactment of Act 6222, H&O also filed a petition for writ of mandamus in the District Court of the Virgin Islands, seeking to compel payment under the contract and citing the enactment of Act No. 6222. However, the District Court denied that petition for lack of original mandamus jurisdiction and, alternatively, also held appellate jurisdiction was not proper since the petition was not filed in the Appellate Division. See *H&O Warehouse, Inc. v. V.I. Public Finance Auth.*, D.C. Civ. 2001/175, June 12, 2002. The court of appeals affirmed that determination. See *H&O Food Warehouse, Inc. v. V.I. Public Finance Auth.*, 70 Fed.Appx. 611,612-13, 2003 WL 21649500,*1(3d Cir. 2003).

Following that determination, H&O on August 19, 2002 amended its contract action in Superior Court to include a request for mandamus relief, and also to add the Public Finance Authority and Governor Charles W. Turnbull as defendants. H&O asserts that case was before the Honorable Ive A. Swan, but has, for approximately four months, been assigned to the Honorable Leon Kendall("Judge Kendall")(collectively, with the Government

and the PFA, the "respondents"), who is now the subject of this mandamus action. H&O further, in January 2004, filed a motion for summary judgment, asserting there was no genuine issue of fact in dispute as to its entitlement to the sums claimed. In opposition to that motion, the Government challenged the validity of Act 6222 which, it argued, raised a genuine issue of material fact as to H&O's entitlement to payment under that measure. A hearing was held on that motion, before the Honorable Ive Swan ("Judge Swan"). However, H&O claimed that, despite Judge Swan's promise to rule on that motion over one year ago, no action has been taken. Additionally, the mandamus petition has remained pending for almost four years.

H&O now seeks mandamus relief in this Court to compel Judge Kendall to rule on the pending motion for summary judgment and the petition for writ of mandamus or, alternatively, to order the trial court to grant relief requested in those motions.

II. DISCUSSION

A. Jurisdiction and Standards of Review

This Court may exercise jurisdiction to consider petitions for mandamus relief, to compel judges of the Superior Court of the Virgin Islands to act or to refrain from acting.

See V.I.R. App. P. 13(a); *In re Richards*, 213 F.3d 773 (3d Cir. 2000).

B. Whether Mandamus Relief Is Warranted.

Mandamus is an extraordinary remedy to be exercised sparingly, and should not be utilized as a substitute for appeal. See *In re Ford Motor Co.*, 110 F.3d 954,957-58(3d Cir. 1997)(citing *Madden v. Myers*, 102 F.3d 74,77 (3d Cir. 1996)).

Mandamus relief is, therefore, appropriate only in limited circumstances where it is shown to be "necessary or appropriate in aid of [appellate] jurisdiction;" the movant has no other adequate means of obtaining relief; the right to the writ is clear and indisputable; and the petitioner stands to suffer some irreparable harm. *Id.*; see also *Glenmeade Trust Co. v. Thompson*, 56 F.3d 476, 483(3d Cir.1995)("Once these prerequisites are met, the issuance of the writ is a matter of discretion."). Such relief is appropriate only where there is a clear error of law or such a usurpation of power as to amount to an abuse of discretion. *Citibank, N.A. v. Fullam*, 580 F.2d 82, 86 (3d Cir. 1978)("[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy.")(quoting *Will v. United States*, 389 U.S. 90, 95 (1967)); see also, *Dawsey v. Gov't of V.I.*, 931

F.Supp.397, 400-01(D.V.I. App. Div. 1996)(noting relief appropriate where there is a clear abuse of discretion amounting to a usurpation of power). "Therefore, only clear errors of law that 'at least approach the magnitude of an unauthorized exercise of judicial power, or a failure to use that power when there is a duty to do so' require the writ." *In re Richards*, 213 F.3d at 782(quoted *Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988)).

That this matter may be properly decided in aid of our potential appellate jurisdiction is not subject to reasonable dispute, given our jurisdiction to ultimately review the trial court's rulings on the motions and the underlying contract action. See e.g., *United States v. RMI Co.*, 599 F.2d 1183, 1185-86 (3d Cir. 1979)("[T]he action must nevertheless involve subject matter to which our appellate jurisdiction could in some manner, at some time, attach."). Moreover, the movant has adequately established a record of total inaction and undue delay by the trial court in deciding these pending matters, in particular the petition for mandamus relief. The underlying contract action has now been pending for eight years; the motion for summary judgment has languished for over two years.

Moreover, the petition for writ of mandamus has been pending for

just shy of four years. H&O does not have a final judgment from which it can lodge a direct appeal, and no other interlocutory remedy is available to obtain relief for the persistent failure of the trial court to act on these matters.

Given the procedural background of this case, mandamus relief appears appropriate. However, we are confident the Superior Court will act promptly to resolve the pending matters. We will, therefore, deny mandamus relief without prejudice, and retain jurisdiction to act on this matter if, within 60 days hereof, the Superior Court fails to rule on the pending motions for mandamus relief and for summary judgment.³

C. Whether Attorney's Fees and Costs Are Warranted.

H&O additionally requests an award of attorney's fees, costs and interest.

The rules of procedure governing this Court permit an award of attorneys fees and costs, only as associated with an appeal, in the following limited circumstances:

Except as otherwise provided by law, if an appeal is dismissed, reasonable costs, which may include attorney's fees, shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the Appellate Division; if a judgment is affirmed, reasonable costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed,

³ The respondents will, of course, be afforded an opportunity to file an answer prior to issuance of the writ, as required by V.I.R.A.P. 13(b).

reasonable costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, reasonable costs shall be allowed only as ordered by the Appellate Division. *In cases involving the Government of the Virgin islands or an agency or officer thereof, reasonable costs shall only be awarded as authorized by law.*

VIRAP 30 (emphasis added). VIRAP 13, which provides the authority for mandamus actions, does not similarly address attorney's fees.

Given the limitations of Rule 30, and the carefully defined scope of our appellate jurisdiction, this Court has no authority to grant the requested relief at this juncture. Unlike *Gov't of V.I. v. Davis*, 2001 WL 1571052 (D.V.I. App. Div. 2001), on which H&O relies, this is not a direct appeal from a decision in which the prevailing party is entitled to an award of fees as defined in Rule 30. Significantly, this mandamus action does not resolve the underlying issue of H&O's entitlement to obtain payment from the government under the appropriations bill; therefore, an award of fees, costs and interest is inappropriate at this juncture. Indeed, to the extent H&O prevails in its petition for writ of mandamus, it does so only as against the judge of the Superior Court to which this mandamus action is necessarily addressed, in line with this Court's limited mandamus jurisdiction.

In light of the foregoing, this Court will deny H&O's request for interest, attorney's fees and costs.

III. CONCLUSION

H&O's petition for mandamus relief will be denied without prejudice at this juncture. However, this panel retains jurisdiction to consider any renewed petitions for relief in the event the Superior Court fails to act on the pending matters within 60 days of the date of entry of this order.

The petitioner's request for interest and attorney's fees will be denied for the reasons earlier stated.

NOT FOR PUBLICATION

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IN THE DISTRICT COURT OF THE
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DIVISION OF ST. CROIX

a/k/a H&O WAREHOUSE INC OF)
ST. CROIX ,)
Petitioner,)D.C. Civ. App. No. 2006/047
v.)Re: Super. Ct. Civ. 255/1998
GOVERNMENT OF THE VIRGIN ISLANDS)
PUBLIC FINANCE AUTHORITY,)
and CHARLES W. TURNBULL,)
Governor of the Virgin Islands,)
Respondent,)
HONORABLE LEON KENDALL, Judge,)
Superior Court of the Virgin)
Islands,)
Nominal Respondent.)
_____)

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Attorney for Petitioner.

MELVIN H. EVANS, AAG

MARIE E. THOMAS, Esq.
VERNE A. HODGE, JR., Esq.
Attorneys for Respondents.⁴

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|---------------------------|
| ORDER OF THE COURT |
|---------------------------|

PER CURIAM.

AND NOW, for the reasons more fully stated in a Memorandum Opinion entered on even date, it is hereby

ORDERED that the instant petition for writ of mandamus is DENIED WITHOUT PREJUDICE. It is further

SO ORDERED this 7th day of September, 2006.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies (with accompanying Memorandum) to:

Judges of the Appellate Panel

The Honorable Geoffrey W. Barnard

The Honorable George W. Cannon, Jr.

Judges of the Superior Court

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⁴ These attorneys have not filed appearances in this appeal but appear as counsel of record in the underlying matter.